

Order

Michigan Supreme Court
Lansing, Michigan

September 10, 2021

Bridget M. McCormack,
Chief Justice

161804

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 161804
COA: 331602
Wayne CC: 13-000575-FC

KELLI MARIE WORTH-McBRIDE,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the February 13, 2020 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MCCORMACK, C.J. (*concurring*).

I concur with the Court's denial order but write to emphasize an egregious aspect of trial counsel's performance in this case.

Defendant Kelli Worth-McBride's three-month-old son was killed by the child's father. The Wayne County prosecutor charged both parents with first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). The prosecution stated that it was proceeding against Worth-McBride on an aiding-and-abetting theory. As the prosecutor explained at the preliminary examination:

[Worth-McBride's] obligation and her duty to protect her child was to take the child away from [the father] and to not allow her child to be with [the father] who was going to continue, and did continue, to harm that child. She did not do so and, therefore, she aided and abetted in the child abuse and that therefore makes her guilty of the Felony Murder.

In support of this theory, the prosecution relied on evidence revealing long-term physical abuse of the child, as well as statements Worth-McBride made following the child's death that indicated her awareness of the father's actions.

The district court found probable cause to bind Worth-McBride over on an aiding-and-abetting theory. Once in the circuit court, defense counsel moved to quash the information, arguing that criminal liability as an aider and abettor cannot be based solely on the accused's failure to act. See *People v Burrel*, 253 Mich 321, 323 (1931) (“ ‘Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor . . . nor is mere mental approval, sufficient, nor passive acquiescence or consent.’ ”) (citation omitted). The circuit court never ruled on this motion.

At Worth-McBride's bench trial, the prosecution continued to argue that she aided and abetted the father by failing to prevent him from harming their child—that is, that she aided by omission.

The defense did not call any witnesses. Instead, consistent with the (unresolved) motion to quash, the defense argued that Worth-McBride should be acquitted because a person cannot be convicted of aiding and abetting another based solely on his or her failure to act.

The court convicted Worth-McBride of first-degree child abuse and second-degree murder, MCL 750.317. When explaining its verdict, the court stated: “I don't think that she took any direct action to injure this child or abuse this child that led to his death. She just failed to protect him” Later, in addressing Worth-McBride's postconviction motion to vacate her convictions because of the lack of evidence that she actively aided in the abuse, the court announced that it had convicted defendant as a *principal*, not an accomplice. See *People v Beardsley*, 150 Mich 206, 209-210 (1907) (recognizing that parents have a legal duty to prevent harm to their children and that a parent who fails to take “reasonable and proper efforts” may be “guilty of manslaughter at least, if by reason of his omission of duty the dependent person dies”) (quotation marks and citations omitted). While acknowledging that liability as a principal was not what the prosecution argued at trial, the court stated that it was not “bound by the prosecution's theory.”

Worth-McBride appealed, arguing that the evidence was insufficient to sustain her convictions, and the Court of Appeals affirmed. Following oral argument in this Court, we remanded the case to the Court of Appeals to consider whether Worth-McBride's “right to be informed of the nature of the charges against her was violated where the trial court convicted her as a principal . . . despite the prosecution proceeding solely on a theory that the defendant aided and abetted the victim's father in the commission of these crimes.” *People v Worth-McBride*, 504 Mich 899, 899 (2019). The Court of Appeals found no error and affirmed the convictions, explaining that “the trial court utilized the same evidence that was pertinent to the aiding-and-abetting theory” and that Worth-McBride “has not identified any different arguments that she would have made or any additional evidence that she would have presented if the prosecution had preceded [sic] as though defendant had acted as the principal.” *People v Worth-McBride (On Remand)*,

unpublished per curiam opinion of the Court of Appeals, issued February 13, 2020 (Docket No. 331602), pp 7-8. The Court of Appeals declined to address Worth-McBride's related ineffective-assistance claim (that trial counsel should have secured a ruling on the motion to quash) because it was "outside the scope of the remand and . . . could have been raised in her initial appeal." *Id.* at 7.

Due process requires that a criminal defendant be given adequate notice of the nature of the charges against them. See *Cole v Arkansas*, 333 US 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, . . . are among the constitutional rights of every accused in a criminal proceeding . . ."). This right "is a practical requirement that gives effect to a defendant's right to know and respond to the charges against him." *People v Darden*, 230 Mich App 597, 601 (1998). The constitutional notice requirement does not "requir[e] reversal in the absence of a perfectly drafted information." *Id.* Rather, it requires that the accused be given "reasonable certainty" of the nature of the accusation sought to be established, so as to allow them to make their defense. *United States v Simmons*, 96 US 360, 362 (1877). And because absolute perfection in the charging document is not required, it is well established that amendment of the information may occur at any time, so as to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant. See, e.g., *People v Hunt*, 442 Mich 359, 364 (1993); see also MCL 767.76 and MCR 6.112(H).

Applying these principles, I cannot say the Court of Appeals clearly erred when it concluded that Worth-McBride's due-process right to be informed of the nature of the charge against her was not violated by the trial court's conviction of defendant as a principal.

Michigan has abolished the common law's distinction between accessories before the fact and principals. See *People v White*, 22 Mich App 65, 67 (1970) ("Since [MCL 767.39] makes aiders and abettors in the commission of a crime equally guilty with principals, we find that the amendment called for no different defense than would the original charge."). Thus, in a typical case, a defendant who is charged as an accomplice may be held criminally liable to the same extent as the principal. But criminal liability ordinarily attaches to affirmative conduct, and this case involves liability arising from Worth-McBride's omission: her failure to prevent the child's father's criminal acts. See *Beardsley*, 150 Mich at 209-210. It is this omission-based liability that gave rise to Worth-McBride's claim, both at trial and in the unresolved motion to quash, that her alleged failure to act, even if proven, could not create liability as an accomplice as a matter of law. See *Burrel*, 253 Mich at 323.

In my view, trial counsel's failure to obtain a ruling on the motion to quash was egregious. No matter the outcome, a ruling on the motion would have informed

counsel's decision to present a defense at trial that hinged on a particular legal theory—the same theory that the defense sought to test in its motion. I cannot think of any strategic reason for forgoing such a ruling before proceeding to trial. For that reason, I would conclude that that counsel's performance fell below an objective standard of reasonableness. *People v Armstrong*, 490 Mich 281, 289 (2011).

This Court, however, has not been presented with any evidence that the defense would have introduced or arguments it would have made had the court clarified the theory of liability before trial. Nor have we been asked to remand this case for an evidentiary hearing. See *People v Ginther*, 390 Mich 436 (1973). Absent *some* indication how the trial would have differed, I am not persuaded that Worth-McBride has shown a due-process violation requiring a new trial. See *Hunt*, 442 Mich at 365 (“[W]here the elements of both offenses were shown and the defendant has not suggested anything that his attorney would have done differently, we are unpersuaded that there was *unfair* surprise, *inadequate* notice, or an *insufficient* opportunity to defend against the accusations lodged against him.”). Similarly, while I am persuaded that trial counsel's failure to obtain a ruling on the motion to quash fell below an objective standard of reasonableness, retrial is warranted only if the defendant can show that, but for counsel's deficient performance, a different result is reasonably probable. *Armstrong*, 490 Mich at 289. On this record, I can only speculate as to what arguments or evidence might have resulted in a different verdict. If Worth-McBride presents such evidence in a motion for relief from judgment, additional review of her convictions may be warranted.

With these reservations, I concur in this Court's order denying leave to appeal.

CAVANAGH, J., joins the statement of MCCORMACK, C.J.



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 10, 2021

Clerk